Supreme Court, U. S.
FILED
OCT 8 1980
MICHAEL RODAK, JR., CLERK

No. 79-1003

IN THE

Supreme Court of the United States

October Term, 1979

COUNTY OF IMPERIAL, and its BOARD OF SUPERVISORS, OFFICERS, AGENTS and EMPLOYEES,

Petitioners,

vs.

GUILLERMO GALLEGO MUNOZ, HUMBERTO MARTINEZ, JUAN DE LEON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

RESPONDENTS' REPLY BRIEF.

WILLIAM H. KRONBERGER, JR.,
1007 Fifth Avenue, Suite 1100,
San Diego, Calif. 92101,
(714) 231-8491,
Attorney for Respondents.

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

TABLE OF CONTENTS

Page

I.

The Superior Court of California in and for the County of Imperial Is Not a Party to the Within Action 1

II.

There Is No Conflict Between the Federal District Court and the California State Courts 2

III.

The County of Imperial Is Barred by the Doctrines of Res Judicata and Collateral Estoppel From Asserting That the Export Restriction Is an Allocation Among Users or a Land Use Regulation 5

IV.

California's Doctrine of Correlative Rights Affords the County of Imperial No Defense to Its Home Embargo 6

V.

The County of Imperial May Not Regulate Foreign Commerce Through the Conditional Use Permit Process 9

VI.

Respondents Are Strangers to the Prior Proceedings in the California Courts 11

Conclusion 11

TABLE OF AUTHORITIES

Cases	Page
County of Imperial v. McDougal, 19 Cal.3d 505 (1977)	5, 6, 7, 8, 10, 11
Hale v. Bimco, Trading Co., Inc., 306 U.S. 375 (1938)	4
Hudson County Water Co. v. McCarter, 209 U.S. 349 (1908)	6, 7, 8
Hughes v. Oklahoma, 441 U.S. 322, 60 L.Ed.2d 250, 99 S.Ct. 1727 (1979)	6, 8, 9
Statute	
United States Code, Title 28, Sec. 2283	2, 3, 4

No. 79-1003

IN THE

Supreme Court of the United States

October Term, 1979

COUNTY OF IMPERIAL, and its BOARD OF SUPERVISORS, OFFICERS, AGENTS and EMPLOYEES,

Petitioners,

vs.

GUILLERMO GALLEGO MUNOZ, HUMBERTO MARTINEZ, JUAN DE LEON,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

RESPONDENTS' REPLY BRIEF.

I.

THE SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF IMPERIAL IS NOT A PARTY TO THE WITHIN ACTION.

Petitioners in attempting to build up the alleged "conflict" between the federal system and the state system have erroneously captioned the pleadings in such a manner as to infer that the superior court of California in and for the County of Imperial is a petitioner and party. Nothing can be further from the truth. The notice of appeal set forth at

page 126-A of the appendix clearly reveals that the petitioners are the *County of Imperial, and its board of supervisors, officers, agents and employees*. The superior court was not a party to the appeal to the United States Court of Appeals for the Ninth Circuit nor could it possibly be a petitioner before this court. Lest there be any implication that a state court stands before the United States Supreme Court seeking the protection afforded by 28 USC 2283 let it be now dispelled. Respondents herein request that this court order stricken all references to the Superior Court of California in and for the County of Imperial as a petitioner and that the records of the court be amended to reflect the actual identity of the petitioners.

II.

THERE IS NO CONFLICT BETWEEN THE FEDERAL DISTRICT COURT AND THE CALIFORNIA STATE COURTS.

Respondents feel constrained to comment upon the "direct and serious conflict" petitioners allege exists between the state and federal trial courts as exemplified by the state court's contempt judgment against McDougal. (Reply Brief Page 7). It is patently clear from both the order of contempt itself (D 1-4)[1] and the orders of the fourth appellate district, for the State of California (Exhibit A, Amicus Curiae Brief) that the entire question of McDougal's contempt has been stayed awaiting the decision of this court on the constitutional issues presented.

Petitioners seek to avoid this by advising the court that respondents have sought a contempt order against both the County of Imperial and its attorney. Respondents have in-

---

[1]The order or contempt is set forth in the Petition for Certiorari as Appendix D. Citations hereafter will be to Appendix "D."

deed sought to hold counsel for petitioners in contempt for what respondents believe to be a clear violation on his part of his duties in light of the decision of the federal district court. The federal district court has taken no action on respondents' petitions relative to that alleged contempt. Respondents believe that the California Superior Court's contempt order simply reflects a desire on the County of Imperial's part to manufacture an alleged conflict between the state and federal courts for purposes of argument on appeal with respect to the issues presented by 28 USC 2283. Respondents note that the federal district court's preliminary injunction was entered on August 29, 1977 (B-12)[2] and that it was not until March 6, 1979 (D 1-2) that a judgment of contempt was entered against McDougal, a full year and six months after the entry of the preliminary injunction (it should also be noted that but for the instant interlocutory appeal the trial was scheduled for January 10, 1978 [see Clerk's Transcript P. 249] one year and seven weeks prior to the time the superior court felt compelled to enter its contempt judgment). The trial court was long aware of the district court's order and respondents doubt that it would have acted, even in the limited manner it did, but for counsel's persistence in creating a conflict to argue.

Whether counsel for the County of Imperial violated the order entered against him or whether the Superior Court for the County of Imperial, State of California acted on its own as a part of its continuing proceedings in the state action (including the County's nuisance actions heard on February 16, 1978) is irrelevant to the basic premise. The basic fact remains: the state courts have deferred to the federal courts on the Constitutional issue now pending before this court.

---

[2]The district court's preliminary injunction is set forth in the Petition for Certiorari as Appendix "B."

The state superior court's contempt order specifically provides that the order requiring McDougal to cease selling the water for export is stayed for a period of thirty (30) days from the entry of a judgment by the United States Court of Appeals for the Ninth Circuit in favor of the County or in the alternative until a final determination by this court (D-3).

That respondents believe petitioners sought to buttress their arguments a year and one-half after the injunction does not alter the outcome. If petitioners are correct, as they alleged in their response and opposition to petitioner for an order to show cause re contempt, that the superior court commenced proceedings of its own volition, then respondents' argument here that the state superior court was not enjoined by the federal district court's order is established beyond doubt. Petitioners argue below that the superior court acted on its own and respondents here assert it was free to do so. No violation of 28 USC 2283 therefore exists.

If respondents are correct in their views that the superior court acted only in response to petitioners' efforts to contempt McDougal, the argument made here is even further reinforced for the superior court's limited stay proves the point. If the contempt resulted from the County of Imperial's insistence, then the superior court pacified the County while at the same time recognizing the appropriateness of a final federal decision on the Constitutional question before it proceeded with enforcing its orders against McDougal.

There is simply no conflict between the two systems. California's courts, like those of Florida in *Hale v. Bimco, Trading Co., Inc.*, 306 U.S. 375 (1938) await this court's disposition of a federal Constitutional question.

III.

THE COUNTY OF IMPERIAL IS BARRED BY THE DOCTRINES OF RES JUDICATA AND COLLATERAL ESTOPPEL FROM ASSERTING THAT THE EXPORT RESTRICTION IS AN ALLOCATION AMONG USERS OR A LAND USE REGULATION.

Petitioners have made much of the prior litigation it engaged in with its co-defendant McDougal, yet the fact is simply that the only parties bound in its proceeding are the petitioners. They are bound by the California Supreme Court's ruling in *County of Imperial v. McDougal*, 19 Cal.3d 505 (1977) (C 1-11) that "the limitation was intended to accomplish only what it clearly states, i.e., a prohibition against exporting water from the County." (C-9).

Amicus curiae and petitioners have managed to muddy the waters upon which the issues before this court float by injecting reams of material concerning the potential for overdraft in the water basin. Questions of water quality and quantity are simply not relevant to the inquiry before this honorable court. Amicus curiae's Exhibit "B" and petitioners recitation of conclusions of David Huntley (RB-16) (not to mention other extraneous letters from other unknowns outside the record such as Sam Gallagher) serve only to point out the truth of what petitioners have maintained all along: an adequate state forum and appropriate state statutory procedures exist in which defendants may dispute the impact of McDougal's operation on the ground water basin without simply banning transportation of water outside of the County. The cited materials reveal that the County and McDougal are engaged in a spirited debate before the Regional Water Quality Control Board, Colorado River Basin and the State Water Resources Control Board

relative to dangers, if any (see conclusions Amicus Curiae brief, Exhibit A 21-22), from operation of McDougal wells.

The fact that these proceedings are taking place reinforces the basic relationship between the holdings in *County of Imperial v. McDougal, supra*, to which the County is bound, and the appropriateness of the U.S. District Court of Appeals instruction that the commerce issue be decided in light of *Hughes v. Oklahoma*, 441 U.S. 322 60 L.Ed.2d 250, 99 S.Ct. 1727 (1979). The conditional use permit restriction represents the County of Imperial's export policy and not some esoteric land use consideration or desire to apportion use among overlying land owners. The County is bound by the California Supreme Court holding that it is simply employing an export ban and all of the letters from and to various individuals and hypertechnical ground water reports found in petitioners' reply brief and amicus curiae's brief serve only to avoid the real issue — may the County impose an outright ban on export? The answer must be no.

IV.

CALIFORNIA'S DOCTRINE OF CORRELATIVE RIGHTS AFFORDS THE COUNTY OF IMPERIAL NO DEFENSE TO ITS HOME EMBARGO.

California's Correlative Rights Doctrine will not serve as a basis for rejecting this court's analysis in *Hughes v. Oklahoma*, 441 U.S. 322 (1979) in favor of the analysis in *Hudson County Water Co. v. McCarter*, 209 U.S. 349 (1908). California's Correlative Rights Doctrine does not render the analysis of this court in *Hudson County Water Co., supra*, and *Hughes v. Oklahoma, supra*, inconsistent nor does it afford the County a basis from which it may pose a ban upon the transportation and use of water once it has been appropriated.

"Correlative rights" is a word of art meaning simply that Californians who own land over a ground water basin may obtain a certain share of that water for their own use and/or export in accordance with a court ordered apportionment formula.

It represents California's efforts in the heyday of gold mining and cattle ranching to strike a balance between the competing interests of miners who requested export water for mining purposes and cattle barons who needed to irrigate land and water their stock. The doctrine represents a subtle blending of two opposing views as to water rights, riparian and appropriative. California's doctrine thus recognizes two diametrically opposed rights in the same underground water basin.

Allocation of water among overlying owners represents a proper exercise of the police power as did the State of New Jersey's efforts in maintaining the free flow of a river wholly within its boundaries in *Hudson County Water Co. v. McCarter, supra*. The first question presented in any Commerce Clause case is whether or not the regulation is intended to regulate interstate and foreign commerce or whether it is to further some other legitimate local police purpose. This question is reflected in *Hudson County Water Co., supra*, where the court clearly understood that the prevention of diversion of a river wholly within one state to another state was a proper public purpose. Unlike the factual situation in *Hudson County Water Co., supra*, the County of Imperial had no such legitimate public purpose as specifically enunciated by the California Supreme Court in *County of Imperial v. McDougal,* (C 1-10) where the court held that regulation was simply a ban to prevent export. The ban in question is not designed to protect the free flow of a river or even to assure the integrity of the ground water basin since it in no way restricts appropriation of

water within the basin but simply regulates the transportation and use of the water after it has been withdrawn from the well. Nor is it a zoning regulation designed to regulate land use as the County of Imperial argued from 1972 through 1977 when that notion was rejected by the California Supreme Court in *County of Imperial v. McDougal,* (See 8-9). The County of Imperial's newly found public purpose of allocation of use among overlying owners eight years later is of no assistance to it in its search for a legitimate public purpose, for none exists. It is simply an effort by the County of Imperial to ban the export of water and nothing more. It represents the County of Imperial's foreign policy.

If, in a Commerce Clause conflict between local and national interests, it is determined that a legitimate local police power question is involved, such as was present in *Hudson County Water Co., supra,* the court is then faced with the question of whether or not the regulation is a reasonable one. The court's inquiry in *Hughes v. Oklahoma, supra,* focuses in on the second aspect of that analysis; As this court plainly observed where a facial prohibition against commerce is involved the strictest scrutiny will be applied to determine whether or not the least discriminatory method of regulation has been employed. *Hughes v. Oklahoma, supra,* at 336-337. As pointed out earlier, *Hudson County Water Co., Supra,* involved a legitimate state interest, whereas no such local interest is served by the regulation imposed by petitioners. Assuming arguendo, however, that an export ban unrelated to conservation of water serves a legitimate local interest, the ban must fall under the test described in *Hughes v. Oklahoma, supra,* as being the most discriminatory, while at the same time the least effective, method available to accomplish the public purpose. In *Hudson County Water Co., supra,* probably the most effective, if not the only, method to keep a river flowing wholly within

a state's border is to prevent its diversion. It is patently clear however that the most effective method of regulating the use of ground water among overlying users is not an export ban. Were California's Correlative Rights Doctrine applied to the case at hand a means directly related to the end would be employed: a limitation on pumping to fairly allocate a resource among overlying users. Unfortunately, the restriction at hand is not one designed to protect the rights of overlying owners but is simply a ban against the transportation and use of water. As *Hughes v. Oklahoma, supra*, teaches us regulations which effect commerce must be designed in accordance with the least discriminatory alternative. It is inappropriate to urge California's Correlative Rights Doctrine, a doctrine essentially regulating quantities of appropriation, in defense of the most discriminatory alternative available, an export ban which simply effects product destination in a manner unrelated to the quantity of appropriation.

The County of Imperial's foreign trade policy must fall of its own weight.

V.

THE COUNTY OF IMPERIAL MAY NOT REGULATE FOREIGN COMMERCE THROUGH THE CONDITIONAL USE PERMIT PROCESS.

Petitioners seem to argue that since the export restriction is found in a conditional use permit rather than as a part of an overall County ordinance, it is somehow outside of the purview of the Commerce Clause. Regulation of interstate and foreign commerce is simply not a part of the County's zoning powers. Zoning may legitimately have an indirect impact on interstate and foreign commerce by the very nature of the process which dictates which businesses may be conducted in which location of the community and under

what circumstances said businesses might operate. Again, it must be remembered that as the California Supreme Court said in *County of Imperial v. McDougal, supra*, the regulation in question has nothing to do with the enforcement of the County's zoning powers, it is simply a ban against export.

It is the ban against export which is at issue here, not whether or not that ban is effectuated through a conditional use permit process or through a county wide statute.

Respondents are a little unsure from the standpoint of the Commerce Clause as to which would be worse, the County's ability to prohibit specific export or its ability to prohibit all export. Certainly the prohibition of all export on its face would seem to be worse but then again as petitioners point out in their briefs (RB 4), the County is in a position of creating a monopoly and enforcing pricing practices if it can ban the export of water from one well and not another for reasons totally unrelated to land use regulation. Petitioners' protestations to the effect that respondents might purchase water from other land owners with a proper "zoning entitlement"[3] is of no merit since it assumes that the County might grant "proper zoning entitlements" to those well owners who the County believes should operate in the interstate and foreign commerce.

---

[3]It is ironic that the County of Imperial attempts to bolster its argument by noting that respondents could purchase water at the Clifford Well (RB 4), the only other well available to respondents in Imperial County. The irony rests on the fact that on May 27, 1980, the Imperial County Board of Supervisors pursuant to the County's zoning ordinance ordered that the Clifford Well be closed by 1986 as a non-conforming use. It is readily apparent to these respondents that the County is using every means at its disposal to absolutely and flatly cut off the traffic of water in interstate and foreign commerce. The County should not be permitted to argue that respondents could purchase water from a well that the County is aggressively trying to close.

The restriction is not a zoning entitlement as noted by the California Supreme Court in *County of Imperial v. McDougal, supra*. That someone else might not be precluded from selling water to respondents is not an answer to the fact that the County has, for reasons unrelated to zoning or water conservation, unlawfully and in contravention of the United States Constitution interfered with interstate and foreign commerce by absolutely and flatly banning it. The argument that the County is not enforcing an unconstitutional *law* but is simply enforcing an unconstitutional *condition* will not save the County's home embargo from the fate it so justly deserves.

VI.

RESPONDENTS ARE STRANGERS TO THE PRIOR PROCEEDINGS IN THE CALIFORNIA COURTS.

Petitioners continue to allege that respondents are somehow bound to the results of the state proceedings since they are "contractors of McDougal." (Reply Brief 4) Nowhere in the record before this court in the pleadings or in fact can it be said that Messrs. Martinez and DeLeon are contractors of McDougal or have any contractual privity with him whatsoever. The only party with a contract with McDougal is Guillermo Gallego Munoz who, in the second cause of action, seeks specific performance.

Conclusion.

Judgment of the court of appeal should be affirmed.

Respectfully submitted,

WILLIAM H. KRONBERGER, JR.,

Attorney for Respondents.